

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 15, 2008

STATE OF TENNESSEE v. KELLY LYNN HODGE

Appeal from the Criminal Court for Sullivan County
No. S53,457 Robert H. Montgomery, Jr., Judge

No. E2008-00719-CCA-R3-CD - Filed March 4, 2009

The Sullivan County Grand Jury indicted Appellant, Kelly Hodge, for possession of over twenty-six grams of cocaine with intent to sell or deliver. Appellant pled guilty to possession of cocaine with intent to sell or deliver. The trial court sentenced Appellant to three years to be served on probation. During her sentencing hearing, Appellant requested judicial diversion. *See* T.C.A. § 40-35-313. The trial court heard evidence on Appellant's suitability for judicial diversion but denied her request. Appellant's sole issue on appeal is whether the trial court erred in denying her judicial diversion. After a thorough review of the record, we determine that the evidence supports the trial court's conclusion. Therefore, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Randall D. Fleming, Kingsport, Tennessee, for the appellant, Kelly Lynn Hodge.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Greeley Wells, District Attorney General, and Kent Chitwood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In August of 2006, Appellant and Victor Fortune ("Co-defendant Fortune") came to Kingsport during the races at Bristol Motor Speedway for Appellant to work at The Mouse's Ear, an adult entertainment dance club. On August 23, 2006, police officers were called to the apartment of Amanda Ingle ("Co-defendant Ingle") with regard to a domestic disturbance. Co-defendant Ingle led the police officers to a back bedroom that Appellant and Co-defendant Fortune had been sharing for about ten days. While in the bedroom, the officers found over 140 grams of cocaine under a towel on a chair. The State charged Appellant and the two co-defendants with possession of cocaine.

On May 22, 2007, the Sullivan County Grand Jury indicted Appellant for possession of more than twenty-six grams of cocaine with intent to sell or deliver, a Class B felony. On February 29, 2008, the trial court accepted Appellant's guilty plea to possession of cocaine with intent to sell or deliver, a Class C felony. Appellant requested judicial diversion. The trial court held a hearing on Appellant's request.

At the conclusion of the hearing, the trial court denied Appellant's request for judicial diversion. The trial court sentenced Appellant to three years as a Range I offender. The trial court placed Appellant on supervised probation for all three years. A fine of \$2,000 was also imposed.

Appellant filed a timely notice of appeal.

ANALYSIS

Appellant's sole issue on appeal is her assertion that the trial court erred in denying judicial diversion. The State disagrees.

According to Tennessee Code Annotated section 40-35-313, commonly referred to as "judicial diversion," the trial court may, at its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A). A qualified defendant is one who:

- (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
- (b) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and
- (c) Has not previously been convicted of a felony or a Class A misdemeanor.

T.C.A. § 40-35-313(a)(1)(B)(i)(a), (b), & (c). When a defendant contends that the trial court committed error in refusing to grant judicial diversion, we must determine whether the trial court abused its discretion by denying the defendant's request for judicial diversion. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion include the following: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. *Cutshaw*, 967 S.W.2d at 343-44; *Parker*, 932 S.W.2d at 958. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as the defendant. *Cutshaw*, 967 S.W.2d at 344; *Parker*, 932 S.W.2d at 958; *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000).

After hearing the evidence, the trial court concluded that several factors weighed against the grant of judicial diversion. The trial court first focused on Appellant's amenability to correction. The trial court stated that it did not find Appellant amenable to correction primarily because after her arrest and six days spent in jail, Appellant returned to her lifestyle as an adult entertainer at dance clubs and she also continued to use marijuana. The trial court did state that Appellant had attempted to change her lifestyle in the month before the hearing. However, the trial judge stated that he could not tell "that it's going to take, so I have to take so I have to look at your actions since this occurred some year and a half ago, August of 2006." The trial court also found that the circumstances of the offense weighed against judicial diversion. The trial court pointed out that the amount of cocaine found by the police was over 100 grams. The trial court stated that it found "it very hard to believe" that Appellant did not know what Co-defendant Fortune was doing. The trial court concluded that Appellant was turning a blind eye to Co-defendant Fortune's activities. This concerned the trial court because the trial court noted that cocaine destroys many lives and Appellant was assisting in destroying those lives. The trial court stated that Appellant did not have a criminal record outside of a juvenile conviction for shoplifting, but her history of marijuana use constituted criminal history. With regard to her social history, the trial court stated that it was concerned about her employment in adult entertainment at dance clubs for a year and a half.

We have reviewed the evidence presented to the trial court at the sentencing hearing. The trial court considered the necessary factors required when determining whether to grant or deny judicial diversion. We conclude that there was "substantial evidence" to support the trial court's denial of judicial diversion. *See Cutshaw*, 967 S.W.2d at 344; *Parker*, 932 S.W.2d at 958.

Therefore, this issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

JERRY L. SMITH, JUDGE

